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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GILLES RUBINSTENN, DANIELA
GIACCHETTI, and FRANCIS PRUCHE

Appeal 2010-009210
Application 10/024,496
Technology Center 3600

Before HUBERT C. LORIN, JEAN R. HOMERE, and BIBHU R.
MOHANTY, *Administrative Patent Judges*.

MOHANTY, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

The Appellants seek our review under 35 U.S.C. § 134 (2002) of the final rejection of claims 1-50 which are all the claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b) (2002). Oral arguments were presented on September 14, 2010.

SUMMARY OF THE DECISION

We AFFIRM.

THE INVENTION

The Appellants' claimed invention is directed to methods and systems for providing beauty advice based on personal information and local information such as weather. (Spec. [001]). Claim 25, reproduced below with the numbering in brackets added, is representative of the subject matter of appeal.

25. A method for providing beauty advice to a subject, the method comprising:

- obtaining, by a computer system, personal information about the subject, the personal information including at least demographic information about the subject, the demographic information reflecting a geographic area location of the subject;

- generating a list of a plurality of cosmetic products for the subject;

- receiving from the subject a request for cosmetic advice;

- [1] accessing local information for the geographic area; and

- [2] generating, by the computer system, at least one

- recommendation for use of at least one cosmetic product on the list, the at least one recommendation being a function of the personal information of the subject and the local information.

THE REJECTIONS

The Examiner relies upon the following as evidence in support of the rejections:

Fox	US 5,796,932	Aug. 18, 1998
Farchione	US 2002/0059248 A1	May 16, 2002
Anderson	US 2002/0082869 A1	Jun. 27, 2002
Maloney	WO 01/18674 A2	March 15, 2001

Ogilvie, Madeline, Why Women Wear Lipstick: Preliminary Findings, Edith Cowan University.

The following rejections are before us for review²:

1. Claims 25 and 26 are rejected under 35 U.S.C. § 102(a) as anticipated by Maloney.
2. Claims 1-9, 11-13, 17-18, 20-24, 27, 30-32, and 34-50 are rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney and Fox.
3. Claim 10 is rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Fox, and Anderson.
4. Claims 14-16, 28-29, and 33 are rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Fox, and Farchione.
5. Claim 19 rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Fox, and Official Notice.

² We note that the Examiner has withdrawn the rejections made under 35 U.S.C. § 101 (Ans. 22).

THE ISSUES

At issue is whether the Appellants have shown that the Examiner erred in making the aforementioned rejections.

With regards to the rejections of claims 25 and 26, this issue turns on whether Maloney discloses the argued cited claim limitations [1] and [2].

With regards to the rejections of claims 1-24 and 27-50 this turns first on whether the cited prior art discloses the argued claim limitations as made for each respective claim. This issue turns second on whether a proper rationale has been provided for combining the references.

FINDINGS OF FACT

We find the following enumerated findings of fact (FF) are supported at least by a preponderance of the evidence:³

FF1. Maloney has disclosed a method and apparatus for providing a customized product to a consumer (Title, Abstract). The products may include beauty care products (Col. 7:15-17).

FF2. Maloney has disclosed collecting profile data about a consumer by providing them with a test kit which can comprise tests to determine the physiological conditions of the consumer such as skin dryness, skin oiliness, hair dryness, and color complexion. The test kit would also preferably comprise environmental tests for factors such as water hardness, water pH, etc. (Col. 11:6-15).

³ See *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Patent Office).

FF3. Maloney has disclosed customizing a customer selected product to meet the consumer's physiological and external conditions (water hardness, etc.). Questions are presented to elicit this consumer profiling data (Col. 10:5-12).

FF4. Maloney has disclosed that a list of recommend product choices which correspond to an updated consumer profile is provided to the customer. (Col. 16:2-6).

FF5. Fox has disclosed a system for displaying the impact of weather on managerial planning decisions (Title) including retail planning applications for personal care and consumer products (Abstract).

FF6. Fox has disclosed presenting the user with a graphical presentation of last years weather variables by time period by location. The weather/sales variables are presented by comparison to last years data and forecasted data. Weather variables include forecasted temperature, precipitation, and snowfall. Weather data may include humidity, cloud cover, and heating/cooling degree days. (Col. 13:4-15).

FF7. Fox has disclosed the effect of weather variables on sales for a given product and at a particular location for a particular time period (Col. 16:36-39).

FF8. Fox has disclosed that client data is used to refer to all types of data which is weather impacted. Data includes demographic data (Col. 9:18-24).

FF9. Anderson has disclosed a system for providing customized health care information based on an individual's genome (Title).

FF10. Farhicone has disclosed a method for determining proper color for makeup and clothing (Title).

FF11. Ogilvie has disclosed that lipstick is an important part of most respondent's daily grooming routine with 76% of a sample responding that they would wear lipstick 6 or more days a week (Page 4).

ANALYSIS

Claims 25-26

The Appellants argue that the rejection of claims 25-26 is improper because Maloney fails to disclose claim limitations [1] and [2] (Br. 17-19, Reply Br. 7).

In contrast the Examiner has determined that the rejection of claims 25- 26 is proper (Ans. 22-24).

We agree with the Examiner. In claim 25, claim limitations [1] and [2] require:

- [1] accessing local information for the geographic area; and
- [2] generating, by the computer system, at least one recommendation for use of at least one cosmetic product on the list, the at least one recommendation being a function of the personal information of the subject and the local information. (Claim 25).

Maloney has disclosed *collecting profile data* about a consumer by providing them with a test kit which can comprise tests to determine the physiological conditions of the consumer such as skin dryness, skin oiliness, hair dryness, and color complexion. The test kit can also include *environmental tests such as water hardness, water pH*, etc. (FF2, FF3). These environment tests for water hardness and pH serve as the claimed "local information for the geographic area" since water hardness and pH vary by locality and would be *accessed* when the profile data was used meeting the cited claim limitation [1] under the broadest reasonable

interpretation. Maloney has also disclosed that *a list of recommend product choices* which correspond to an updated *consumer profile* is provided to the customer (FF4) which serves the claimed product recommendation for both personal (physiological) and local (external conditions such as water hardness and ph) information meeting the cited claim limitation [2]. For these reasons the rejection of claims 25-26 is sustained.

Claims 1-18, 20-24, 27-50

The Appellants argue that the rejection of claims 1 is improper because Maloney and Fox fail to disclose generating a recommendation for a product for many of the same reasons addressed above (Br. 20-22). The Appellants also argue that Fox merely discloses depicting the effect of weather variables for a given product at particular location and time period and that there is no proper rationale for the combination (Br. 22, Reply Br. 8).

In contrast the Examiner has determined that the rejection of claim 1 is proper (Ans. 25-27).

We agree with the Examiner. As discussed above, Maloney does disclose generating a product recommendation (FF4) based on personal and local information. Fox has disclosed a system for displaying the *impact of weather* on managerial planning decisions including retail planning applications for *personal care and consumer products* (FF5). Fox has also disclosed presenting the user with a graphical presentation of last years weather variables by time period by location and that the *weather data* may include *humidity, cloud cover*, and degrees of heat. (FF6). Fox has also

disclosed the effect of weather variables on sales for a given product and at a particular location for a particular time period (FF7) as well as the use of *demographic data* (FF8). The modification of the system of Maloney, which makes product recommendations, to also include weather and demographic data as disclosed by Fox is considered an obvious, predictable combination of familiar elements for the advantage of having a more accurate product recommended by taking into account those additional factors of weather and demographics. For these reasons the rejection of claim 1 is sustained. The Appellants have provided the same arguments for claims 2-9, 11-13, 17-18, 20-24, 30-31, and 48 and the rejection of these claims is sustained for these same reasons.

With regards to claim 27, the Appellants make many of the same arguments addressed above (Br. 23-24). The Appellants also argue that Maloney and Fox fail to disclose “memory for storing a program that accesses local information for the geographic area” (Br. 23, Reply Br. 9-10). The Examiner has determined that Maloney discloses such a feature (Ans. 27-28). We agree with the Examiner. Both Maloney and Fox are both directed to the use of a system on computers so the use of the memory would be provided in either reference. For this reason and the reasons given above, the rejection of claim 27 is also sustained.

The Appellants have provided essentially the same arguments for claims 32, 34-47, and 49-50 (Br. 25-30) and the rejection of these claims is sustained for the same reasons given above as well. With regards to claim 32 note that Fox discloses using *forecasted weather data* which under the broadest reasonable interpretation serves as a “weather forecast”. With regard to claims 43-47 Maloney has disclosed making a product

recommendation (FF4) which would be considered making a “cosmetic analysis” under the broadest reasonable interpretation in light of the Specification. Note that the Appellants has cited to Fig. 2 of the Specification as providing support for the “cosmetic analysis” (Br. 13) and that Fig. 2 shows such a product recommendation.

The Appellants argue that the rejection of claims 10 is improper for many of the same reasons addressed above (Br. 31). For the same reasons given above, the rejection of claim 10 is sustained. Note that the combination of Maloney and Fox would provide product recommendations which would result in the exclusion of certain products which were not recommended. Only those arguments actually made by Appellants have been considered in this decision. Arguments which Appellants could have made but chose not to make in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2008).

The Appellants also argue that the rejection of claims 14-16, 28-29, and 33 is improper for the same reasons addressed above (Br. 32-33). For the same reasons given above, the rejection of these claims is also sustained.

Claim 19

The Appellants argue that the rejection of claim 19 is improper because the Examiner has failed to take proper Official Notice that consumers have a habit to use cosmetic products everyday and that the “suggesting” feature would not have been obvious (Br. 35-36, Reply Br. 13).

In contrast the Examiner has determined that the rejection of claim 19 is proper (Ans. 43-44).

We agree with the Examiner. In response to the Appellants' assertion of an improper taking of Official Notice, the Examiner provided the Ogilvie reference which shows that consumers use lipstick (a consumer product) almost daily (FF11). It would have been an obvious modification to the combination to provide a "suggestion" that the consumer keep an adequate supply of beauty products in their supply to increase sales for those products. In a Section 103 analysis "the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Here, one of ordinary skill in the art would have readily inferred that suggesting consumers bought enough products as would be required could increase product sales. For these reasons the rejection of claim 19 is sustained.

CONCLUSIONS OF LAW

We conclude that Appellants have not shown that the Examiner erred in rejecting claims 25 and 26 under 35 U.S.C. § 102(a) as anticipated by Maloney.

We conclude that Appellants have not shown that the Examiner erred in rejecting claims 1-9, 11-13, 17-18, 20-24, 27, 30-32, and 34-50 under 35 U.S.C. § 103(a) as unpatentable over Maloney and Fox.

We conclude that Appellants have not shown that the Examiner erred in rejecting claim 10 under 35 U.S.C. § 103(a) as unpatentable over Maloney, Fox, and Anderson.

We conclude that Appellants have not shown that the Examiner erred in rejecting claims 14-16, 28-29, and 33 under 35 U.S.C. § 103(a) as unpatentable over Maloney, Fox, and Farchione.

We conclude that Appellants have not shown that the Examiner erred in rejecting claim 19 under 35 U.S.C. § 103(a) as unpatentable over Maloney, Fox, Official Notice.

DECISION

The Examiner's rejection of claims 1-50 is sustained.

AFFIRMED

MP

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